

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
AKRON

IN RE:	)	CASE NO. 02-52314
	)	
Alexander and Sandra Athens,	)	CHAPTER 13
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	ORDER RE OBJECTION TO
	)	AMENDED PROOF OF CLAIM

This matter came on for hearing on August 26, 2004 pursuant to the Debtors' request for hearing regarding the distribution of proceeds from the sale of real estate [docket # 51], the Trustee's Claim Recommendation [docket # 49]<sup>1</sup> with respect to the Claim (defined below) [claim # 5] and Amended Claim (defined below) [claim # 23] of Timothy McKinzie, Esq. , the responses thereto [docket # 57 and 58], and the Debtors' objection to the Amended Claim of Timothy McKinzie [docket # 65].

**I. JURISDICTION**

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

**II. BACKGROUND**

The facts in this matter are not in dispute. Alexander and Sandra Athens filed a

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<sup>1</sup> Prior to the hearing, the Trustee had withdrawn his Claim Recommendation as a result of the agreed entry authorizing partial payment of the Claim of Timothy McKinzie from the closing. The issue remaining before the Court is similar and at the hearing, counsel for Mr. McKinzie indicated that his position in response to the Debtor's objection to the Amended Claim was set forth in Mr. McKinzie's response to the Trustee's Claim Recommendation.

voluntary petition for relief under chapter 13 of the Bankruptcy Code on May 23, 2002 (the "Petition Date"). The bar date for filing proof of claim forms was September 20, 2002.

Prior to the Petition Date, Reminger & Reminger obtained three judgments against the Debtors in the total amount of \$112,811.07 plus 10% interest which were assigned to Mr. Timothy McKinzie ("Mr. McKinzie"). Certificates of Judgment were filed against the Debtors on May 18 and 19, 2000.

On June 20, 2002, Mr. McKinzie filed a proof of claim (the "Claim") in the Debtors' bankruptcy case. Mr. McKinzie used Official Form 10<sup>2</sup> to complete his proof of claim. Mr. McKinzie's Claim filed in June, 2002 reads as follows:

4. Total Amount of Claim at Time Case Filed:	<u>\$143,130.26</u>
If all or part of your claim is secured or entitled to priority, also complete Items 5 or 6 below.	
<input checked="" type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.	

Attached to the Claim is an itemized statement which provides for an annual interest rate of "0.1" and calculates the amount of Mr. McKinzie's claim from December 22, 1998 through the Petition Date. In addition, Mr. McKinzie completed item 5 on Official Form 10 regarding the secured status of his claim.

On October 2, 2003, the Debtors' plan was confirmed. The plan provides for payment

2

4. Total Amount of Claim at Time Case Filed:	\$ _____
If all or part of your claim is secured or entitled to priority, also complete Items 5 or 6 below.	
<input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.	

of Mr. McKinzie's Claim inside the plan as a secured claim in the amount of \$150,000 with 10% interest to be paid in full.<sup>3</sup> The plan contemplated the receipt of \$3,000 per month from the Debtors and additional funding for the payment of claims from the sale of certain real estate in Medina, Ohio. The length of the plan was contemplated to be fifty-four months. *See* Plan, ¶10.

Thereafter, Mr. McKinzie filed an amended proof of claim on March 18, 2004 (the "Amended Claim") which provides as follows:

4. Total Amount of Claim at Time Case Filed: \$143,130.26 plus 10% interest per annum

If all or part of your claim is secured or entitled to priority, also complete Items 5 or 6 below.

☒ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

On March 30, 2004, the Trustee filed a Claim Recommendation requesting that Mr. McKinzie's claim be paid as a secured claim in the amount of \$131,106 with 10% interest from March 18, 2004.<sup>4</sup> To date, Mr. McKinzie has received payment on his Claim in the sum of \$142,024.26, consisting of \$130,000 from the closing on the sale of the real estate and \$12,024.26 from the Chapter 13 Trustee.

<sup>3</sup> Specifically, the plan provides, "Allowed secured claims shall be paid in full inside the plan by the Trustee as set forth below, ... . If the amount set forth in the unsecured column is zero, the intent of the plan is to pay the secured claim in full inside the plan. ...

Creditor	Secured Value	Interest	Unsecured Value	Fixed Pmt.
Reminger & Reminger	\$150,000	10%	-0-	N/A

<sup>4</sup> The proposed principal amount of the claim appears to take into account the distribution to Mr. McKinzie from the Chapter 13 Trustee in the amount of \$12,024.26 during the period from May 24, 2002 through April 15, 2004.

### III. DISCUSSION

The Debtors' argue that the initial proof of claim filed by Mr. McKinzie did not request the payment of interest. Therefore, they suggest, Mr. McKinzie would only be entitled to interest if he properly amended his proof of claim form to request such interest. The Debtors argue that Mr. McKinzie did not properly amend his proof of claim and thus, he should not be entitled to postpetition interest on his claim. Thus, from the Debtors' perspective the issue before the Court is whether or not a creditor has an unrestricted right to file an amended proof of claim to request payment of postpetition interest in addition to the amount originally set forth on the proof of claim.

From Mr. McKinzie's perspective the Court is faced not with the issue identified above but rather with whether or not an oversecured creditor is entitled to interest on his secured claim. Mr. McKinzie argues that his initial proof of claim did properly request the payment of interest. Second, Mr. McKinzie argues that as an oversecured creditor, he is entitled to interest on his claim pursuant to section 506(b) of the Bankruptcy Code.

### IV. ANALYSIS

Based upon the foregoing, the Court believes the issue before it is whether an oversecured creditor has to request explicitly postpetition interest on the face of its initial proof of claim or lose its right to such postpetition interest.

Bankruptcy Rule 3002(c) provides that in a chapter 13 case a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors. "A creditor is permitted to file a proof of claim after the bar date when the proof of claim is an amendment to a timely filed claim but not when the proof constitutes a separate and distinct claim." *In re Blasio, Case No. 92-51128 (Bankr. N.D. Ohio 1995)*, unpublished Order Allowing Claim as

an Amended Proof of Claim dated January 23, 1995 citing *In re Osborne*, 159 B.R. 570, 573 (Bankr. C.D. Cal. 1993).

The Debtors cite to *In re Carr*, 134 B.R. 370 (Bankr. N.D. NE 1991) for the proposition that in order for the court to allow an amended claim, the party seeking to amend the claim must obtain leave of court. This Court has, however, noted that a creditor may file, without prior leave of court, a proof of claim after the bar date when the proof of claim is an amendment to a timely filed claim. *In re Blasio*, pg. 3. "Should it be determined that such an amendment acts to cure a defect in the original claim, provide greater detail to a previously filed claim, or plead a new theory on previously filed facts, then it is within the sound discretion of this Court as to whether the amendment should be allowed." *Id.* pg. 4

Courts exercising this discretion often look to two factors: (1) Does the amended claim reasonably relate to the claim?; and (2) Is the allowance of the amended claim equitable? The Debtors do not dispute that in this case the Amended Claim reasonably relates to the Claim. Rather, the Debtors suggest that they will suffer undue prejudice because the money being paid to Mr. McKinzie for postpetition interest could otherwise be used to pay the Debtors' other creditors sooner. The Court does not reach the second factor because it finds that, even if the Debtors' objection to the Amended Claim were well taken, the Claim still stands and under the Claim, as filed initially, Mr. McKinzie, as an oversecured creditor, is entitled to postpetition interest on his allowed secured claim.

The bankruptcy court for the Eastern District of Tennessee found, when the collateral was probably worth more than the full amount of the original claim, the state was entitled to postpetition interest on its claim despite the state's failure to request postpetition interest in original claim. See *Still v. State of Tennessee, Dept. of Revenue (In re Rogers)*, 57 B.R. 170,

174 (Bankr. E.D. Tenn. 1986).

The amendment to add the postpetition interest is also a late amendment, but should perhaps be allowed. It appears that the collateral was probably worth more than the full amount of the original claim. If the plan had originally provided for a sale of the collateral, the State would have been entitled to the claim plus postpetition interest up to the time of the sale. 11 U.S.C. § 506. The proof of claim, however, need not have included a request for payment of the postpetition interest in order for it to be paid from the sale proceeds. The amount to be paid on the claim would be determined only after the sale. The plan has in effect been modified to provide for the sale of the collateral. The court will allow the postpetition interest for this reason ...

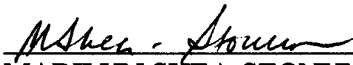
*Id.*; compare *Matter of Chappell*, 984 F.2d 775, FN2 (7<sup>th</sup> Cir. 1993)(leaving aside the question of whether, by itself, the failure of Loves Park's proof of claim to state explicitly that it sought interest on the second mortgage waived any rights under section 506(b), but noting that in the two cases Homebanc principally relies upon in support of its claim for interest, the creditor explicitly made a claim for interest in its proof of claim) citing *In re Fawcett*, 758 F.2d 588, 590-91 (11th Cir.1985); *In re Wilkins*, 71 B.R. 665, 668 (Bankr. N.D.Ohio 1987); and *Collier* at ¶ 506.05 at 54-55 (1992) (noting that it is unclear whether a request for interest under section 506(b) must be made explicit in a proof of claim, and suggesting that "any secured creditor intending to seek allowance of postpetition amounts under section 506(b) would be well-advised to make that fact clearly known in its proof of claim").

In this case, Mr. McKinzie is claiming entitlement to interest on his oversecured claim. Mr. McKinzie's initial proof of claim clearly indicated that the amount of his Claim consisted, in part, of interest, in addition to the principal amount of the claim and attached a break down of the calculation of interest through the petition date. In addition, Mr. McKinzie indicated on the face of the initial Claim that he believed his Claim was oversecured by checking the secured claim box and claiming that the collateral securing his claim had a value of \$425,000. This Court finds that Mr. McKinzie's initial proof of claim was a sufficient

assertion of his request for postpetition interest on his oversecured claim.

Therefore, the Debtors' Objection to Amended Proof of Claim is overruled and Mr. McKinzie's Claim, as amended, is allowed and Mr. McKinzie shall receive postpetition interest on his Claim at the rate of 10% .

IT IS SO ORDERED

  
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MARILYN SHEA-STONUM  
Bankruptcy Judge

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 3<sup>rd</sup> day of December, 2004, the foregoing Order was sent via regular U.S. Mail to:

Marc P Gertz  
Goldman & Rosen, Ltd  
11 S Forge St  
Akron, OH 44304

Morris H Laatsch  
Baker, Hardesty & Kaffen  
520 S Main St  
#500  
Akron, OH 44311

  
Julie K. Zurn, *Low Clerk*